(Testimony of Mrs. Eleanor McKenna.)

Q. In other words, when the act of transferring a certain type case into another was completed you would then come out with the empty case?

A. That's right.

Q. As far as Mr. Menges' words are concerned, the words he used was "transfer eggs out of one case into another"; isn't that correct?

A. No, that is not correct.

Q. What were the words he used?

A. "Transfer the eggs out of the stamped case."

Q. "Out of the stamped case"? A. Yes.

Q. Into what?

A. Into the plain cases.

Q. Did you observe the stamp, do you know where the eggs that were covered by the stamp came from? A. The cases were stamped.

Q. Do you know where they came from?

A. The eggs that we girls transferred in the candling room came from the outside of the bench.

Q. From the outside of what?

A. From the outside of the bench of the candling room.

Q. But where they came from you don't know, do you?

A. I don't know where they came from, no.

Q. On many occasions you transferred from 30 dozen cases to 15 dozen cases, isn't that right?

A. Will you repeat that?

Q. On many occasions during the period you were there you transferred eggs from cases that held 30 dozen to cases that held fifteen dozen, isn't that right, half cases?

(Testimony of Mrs. Eleanor McKenna.)

A. When the half case was used they would do the same thing.

Q. Yes, didn't you transfer cases out of full cases into half cases? A. Yes.

Q. You transferred those out of stamped cases, you transferred eggs out of unstamped cases, you transferred eggs out of cases into half cases?

A. Yes.

Mr. Faulkner: That is all.

Redirect Examination

Mr. Houck: Q. Mrs. McKenna, on these occasions you testified about on direct examination, how long was it after you finished transferring the eggs out of the stamped case did you start to refill those cases? A. Well, almost immediately.

Mr. Houck: Almost immediately. That is all.

Recross Examination

Mr. Faulkner: Q. Mrs. McKenna, the time when you would commence filling what you have referred to as a stamped case would depend on how long it took you to finish the job of transferring, wouldn't it? A. Not necessarily.

Q. It would not. What do you mean by "almost immediately"?

A. A few girls made the transfer out of stamped cases and another girl could be filling the empty case.

Q. But as soon as you would transfer the girl

(Testimony of Mrs. Eleanor McKenna.)

who would transfer the eggs, at the same time she didn't fill the empty case, did she?

A. Not at the same time, but after she got through she could do that, and on many occasions she did.

Q. It was not the practice of the girls to take empty cases and fill them at the same time, was it?

A. On different occasions it was done, but not right at the same time that she emptied one case would she fill the other one immediately after. You waited until you got through.

Mr. Faulkner: That is all.

Mr. Houck: That is all.

Mr. Faulkner: I make the same motion, your Honor, in reference to Mrs. McKenna's testimony, to the operations described by Mrs. McKenna and the other witnesses.

The Court: The court has already ruled.

Mr. Faulkner: Exception. [4026]

JUANITA MATHESEN,

called as a witness for the Government in rebuttal; sworn.

The Clerk: Will you state your name?

A. Juanita Mathesen.

Direct Examination

Mr. Houck: Q. Mrs. Mathesen, you were employed by Nye & Nissen as an egg candler, were you not? A. Yes.

(Testimony of Juanita Mathesen.)

Q. What period was that?

A. From 1934 to 1943.

Q. 1934 to 1943. As an egg candler, whom did you receive your instructions from?

A. Ed Menges.

Q. You recall after you moved from the old plant on Townsend Street to the new plant on Missouri Street in October of 1942, do you?

A. Yes.

Q. During the period within a few months previous to moving to the new plant, did Ed Menges instruct you to transfer eggs out of Government-stamped cases and put in their place eggs that had not been Government stamped, inspected, eggs of a different character, without removing the stamp from those cases? A. Yes.

Mr. Faulkner: We object to that on the grounds heretofore urged to these impeaching questions propounded to Mr. Menges, and we make the further objection that the answer would call for the opinion and conclusion of the witness.

The Court: Overruled. She may answer.

Mr. Faulkner: Exception. [4027]

Mr. Houck: Q. What was your answer?

The Witness: A. Yes.

Mr. Houck: That is all.

Mr. Faulkner: Q. What was this period that you have identified, Mrs. Mathesen?

A. Between——

Q. That you have just been asked some questions about, just when did this incident occur?

(Testimony of Juanita Mathesen.)

A. Which one?

Q. The one you just referred to. When did that occur? When did the incident that Mr. Houck asked you about occur?

A. I don't understand.

Mr. Houck: I think, Mr. Faulkner, I did not ask her about any one instance. I asked her if it occurred during this period. She said it did.

Mr. Faulkner: Mr. Menges was interrogated about a single transaction.

Mr. Houck: Oh, no.

Mr. Faulkner: I beg your pardon.

Mr. Houck: Page 3608 in the record.

Mr. Faulkner: That is one single instance.

The Court: Proceed.

Mr. Faulkner: I will ask when that incident occurred, if there was an incident that you can remember where Mr. Menges said something to you about transferring eggs, when did it occur?

A. It occurred on several times.

Q. Well, when? You just answered Mr. Houck's question and [4028] said that he gave you certain instructions. Give me the instance that you recall where he gave you any instructions.

A. Well, you didn't ask me any——

Q. You said he gave you certain instructions.

A. I said he gave me instructions to that effect several times.

Q. During what period, during what period?

A. Several times. I can't say any time. It

(Testimony of Juanita Matheson.)

happened every day. How could I say how often it happened?

Q. Mrs. Matheson, before you came into court——

The Court: Pardon me. Just a moment. Try and fix the time as near as you can, the month or the year it was in.

The Witness: Well, it happened so often I couldn't tell you when.

The Court: All right. Proceed.

Mr. Faulkner: Q. Before you came into court that question that you answered so rapidly propounded by Mr. Houck was read to you, was it not?

A. He has asked me lots of questions when I have talked to him.

Q. But when they asked you that particular question and read it to you, when was that?

A. They asked me that question many times.

Q. Did they ask you that when you got in this room, here, today? A. Today?

Q. Did you discuss your testimony in the little room here today that is closed out there?

A. My testimony like that.

Q. Did you discuss the fact that you were going to be called in here to testify at all?

A. With the other girls that I was with, with the girls that I was with.

Mr. Faulkner: I did not get that. [4029]

The Court: With the girls she was with. You mean the other two girls that have been in here?

The Witness: A. Yes, the other two girls.

(Testimony of Juanita Mathesen.)

Mr. Faulkner: Q. Who else was in there talking to you; was it Mr. Magee? Where is Mr. Magee? Mr. Magee was in there, wasn't he, right there?

A. Not talking about my testimony, no.

Q. He was in there, wasn't he, with the girls?

A. During the recess.

Q. All right. Do you know when the firm of Nye & Nissen moved out to Missouri Street?

A. Yes.

Q. When was it?

A. That was along, it was either the last part of September or the first part of October, 1942.

Q. Will you fix in your mind to your knowledge within two months of that before you moved when you had conversations with Mr. Menges relating to the transfer of eggs?

A. Right up to the time we moved.

Q. Now then, the last occasion then, what did Mr. Menges say to you, what were the words he used?

A. He told me to transfer the eggs out of the Government stamped case into another case, set the case behind me and continue to do it until all the cases were transferred and then transfer back the eggs that he shoved in into Government stamped cases.

Q. That is what he told you to do?

A. Yes.

Q. And he told you to do that many times?

A. Yes. [4030]

(Testimony of Juanita Mathesen.)

Q. You were a kind of overseer of the girls?

A. Yes, I was.

Q. And on occasions the stamped case would come into you and your would empty it?

A. Yes.

Q. Then later eggs would be shoved into the candling room and you would fill the stamped cases? A. Yes.

Q. In connection with that operation the only direction you would receive were those that you have just recited that Mr. Menges told you, is that correct? A. That is correct.

Q. During that period of time you were transferring eggs from fiber cases into wooden cases, weren't you; during the period of time before you moved in 1942 it was a common thing to transfer eggs from one type of case into another, wasn't it?

A. Yes.

Q. The transfer would be made from fiber cases into wooden cases at times and from wooden cases into fiber cases at times?

A. I don't remember transferring into fiber cases.

Q. Mrs. Mathesen, you had thousands of fiber cases and thousands of wooden cases that you were using in your business, isn't that right, when you moved out to 17th and Missouri Streets?

A. I don't remember that.

Q. You don't remember? A. No.

Q. You would not say it was not correct, would you?

(Testimony of Juanita Mathesen.)

A. I wouldn't say it was incorrect, but I don't remember that.

Q. Before you came into court here did Mr. Johnson or Mr. [4031] Magee or any FBI agent tell you in connection with testifying here that you owed a patriotic duty to come into court and testify in this case? A. No.

Q. Was the expression "patriotic duty" used by the FBI agent in the matter of securing you to come in here as a witness? A. No.

Q. Did you tell various employees that are now in the employ of the firm of Nye & Nissen that the FBI agent told you that you had to testify because it was your patriotic duty? A. No, sir.

Q. I did not hear you? A. No.

Q. Did you transfer eggs from whole cases into half-cases? A. Yes, I have.

Q. Did Mr. Menges give you that direction?

A. Yes, I got all my orders from Ed Menges there.

Mr. Faulkner: That is all.

Mr. Houck: Call Mrs. Higuera. This is our last witness of this type, your Honor.

Mr. Faulkner: I make the same motion, your Honor, in regard to Mrs. Mathesen's testimony as I made in respect to Marie Valdez and Mrs. McKenna.

The Court: Denied.

Mr. Faulkner: Exception. [4032]

VIOLET HIGUERA,

called by the Government in rebuttal; sworn.

The Clerk: Will you state your name?

A. Violet Higuera.

Direct Examination

Mr. Houck: Q. Mrs. Higuera, your name was formerly Mrs. McGuinn, was it not? A. Yes.

Q. You were employed by Nye & Nissen as an egg candler? A. Yes.

Q. During what period was that?

A. I went to work for them in 1933.

Q. How long did you work for them?

A. About ten or twelve years.

Q. When did you terminate your employment there? A. In 1942, I think.

Q. In 1942. Was it before or after you moved from the Townsend Street plant to the Missouri Street plant? A. The Missouri Street plant.

Q. So you were employed by them on full time when they were at the Townsend Street plant, is that correct? A. Yes.

Q. As an egg candler whom did you receive your instructions from? A. Ed Menges.

Q. Directing your attention to the few months prior to moving into the new plant, did Ed Menges ever instruct you to transfer eggs out of stamped cases, Government stamped cases, and [4033] to put in their place eggs that had not been inspected, eggs of another quality without removing the Government stamp? A. Yes.

(Testimony of Violet Higuera.)

Mr. Faulkner: I make the same motion heretofore made upon the ground that the answer to that question calls for an opinion and conclusion of the witness and the interpretation of words spoken by Mr. Menges.

The Court: If the witness knows she can answer. Overruled.

Mr. Faulkner: Exception.

Mr. Houck: Q. Did you receive such instructions? A. Yes, I did.

Cross Examination

Mr. Faulkner: Q. Mrs. Higuera, before you came into court just this moment you had that question read to you, had you not, you knew that that particular question was going to be asked you?

A. Yes.

Q. Isn't that correct? Who told you that?

A. This gentleman here.

Q. And he read that question to you and when it came to your turn to answer you said, "Yes."

The Court: It is necessary for the reporter to take down every word you say, so raise your voice.

The Witness: Yes.

Mr. Faulkner: Q. When was the incident that you got the [4034] direction that you just referred to that you got, when was that?

A. It is today.

Q. What? A. Today.

Q. Today. When did you get the instructions, Mrs. Higuera, from Mr. Menges that you referred

(Testimony of Violet Higuera.)

to, in your direct examination, when was that given to you? A. When I worked there.

Q. I mean, when was that, was that in the month of September?

A. Well, all the time, it happened all the time when I worked there.

Q. Mrs. Higuera, you transferred eggs on many occasions? A. Yes.

Q. And when you transferred eggs you ordinarily in the normal course of business got your instructions from Mr. Menges, isn't that right?

A. Yes.

Q. Now then, you were asked a particular question of whether or not during the period of a few months before moving out of the old plant you got some instructions from Mr. Menges; you remember that? A. Yes.

Q. Directing your attention to that period of time, tell me the words Mr. Menges used in respect to transferring eggs out of cases; what did he say to you?

A. He said to transfer the eggs out of the stamped cases into other cases and put the stamped cases behind us and be sure we didn't lose them.

Q. Be sure what?

A. Be sure that they were not lost.

Q. So that the actual words that he used was to transfer eggs out of the stamped cases into other cases? A. Yes.

Q. Then take that case and put it behind you and don't lose the case? A. Yes.

(Testimony of Violet Higuera.)

Q. Would he tell you that all the time?

A. Yes.

Q. So he would tell you then not to lose the stamped case? A. Yes.

Q. Those were the instructions that you received in that period of time prior to moving from the old plant, is that correct; isn't that right?

A. Yes.

Q. When you answered the questions by Mr. Houck and said you had received instructions you meant you would receive the instructions you have just repeated; is that right?

A. The instructions from Ed.

Q. And the instructions you got from Ed were in the substance and in the form as you have just told us?

A. Yes, that we would transfer other eggs into those stamped cases.

Q. Then later you would do that?

A. Right after, yes.

Q. I mean when you completed a single operation of transferring out you then on occasion would transfer in, is that right? A. Yes.

Q. You were transferring eggs from all kinds of cases into all kinds of cases, isn't that right?

A. Yes.

Q. There were thousands of stamped cases in that plant? A. Yes. [4036]

Q. Some were empty?

A. Yes. They had no Government stamp on them.

(Testimony of Violet Higuera.)

Q. Yes, but some of them were empty?

A. Well, the ones that were empty did not have a stamp on them.

Q. In 1942 cases came in there full and empty that had Government stamps on, isn't that right?

A. Yes

Q. You would pass by that floor and see them. In addition to candling eggs you were transferring eggs from fiber cases, that is the paper case, into wooden cases? A. Yes.

Q. And from wooden cases into fiber cases and from full cases into a half-case? A. Yes.

Mr. Faulkner: That is all.

Mr. Houck: No redirect.

The Court: Step down. Is that the case for the Government?

Mr. Pratt: No. We have——

Mr. Faulkner: I make the same motion with respect to this lady.

The Court: The motion will be denied.

Mr. Pratt: We have several other witnesses. Do you want them now?

The Court: Well, "several others". How many?

Mr. Pratt: Well, there will be several short witnesses, three or four more.

Mr. Faulkner: Your Honor, before we conclude, may I [4037] supplement—Mr. Zirpoli has called my attention to the fact the motion to strike these four witnesses is on the ground that impeaching testimony must relate to a time and place and a person and the exact language and where you do

not match up the language with one against the language of the other it won't be impeached.

The Court: Motion denied.

Ladies and gentlemen, keep in mind the admonition of the Court and return here at ten o'clock tomorrow morning.

(Thereupon an adjournment was taken until tomorrow morning, Thursday, April 4, 1946, at 10:00 o'clock a.m.) [4038]

Thursday, April 4, 1946, 10:00 o'clock a.m.

The Clerk: United States vs. Nye & Nissen.

The Court: Waive the roll call, stipulating and agreeing all the jurors are present.

Mr. Faulkner: Yes.

The Court: Proceed.

FRANK GARTENBERG,

called in rebuttal on behalf of the Government.

The Clerk: You have already been sworn in this case, Mr. Gartenberg?

The Witness: Yes, sir.

The Clerk: Will you be seated. Will you state your name?

A. Frank Gartenberg.

Direct Examination

Mr. Pratt: Q. Mr. Gartenberg, on the occasion of your previous testimony you testified in regard to this document, Exhibit 137. Will you look at it?

A. Yes.

(Testimony of Frank Gartenberg.)

Q. That is dated November 3, 1943. After you sent that message or report, did you hear anything from Mr. Moncharsh?

Mr. Faulkner: Your Honor, we object to this as not rebuttal. In other words, Mr. Gartenberg testified to all the transactions in the month of November in relation to the William S. Clark. He testified to his conversation with [4039]. Mr. Moncharsh. He testified to his communication. Now the subject is revived.

Mr. Pratt: If the Court please, the testimony of Mr. Gartenberg was to the effect that he wrote this report and sent it by mail to Mr. Moncharsh, which import, of course, the inference that it was received by mail by Mr. Moncharsh. Mr. Moncharsh then gets on the stand and says he never received it. The purpose of this testimony is to show that he did receive it.

Mr. Faulkner: If your Honor please, the witness was called originally for transactions that he had with Mr. Moncharsh in relation to the William S. Clark. They inquired into it. He was cross examined on the subject of every telephone conversation, letter, or conversation, letter of anything else was inquired into in their case in chief. He has already testified on the subject.

Mr. Pratt: This is plain, ordinary rebuttal in answer to Mr. Moncharsh, that he received it.

Mr. Faulkner: Mr. Gartenberg said he sent this letter——

(Testimony of Frank Gartenberg.)

Mr. Pratt: Pardon me. Let me complete my sentence:

Mr. Faulkner: I beg your pardon.

Mr. Pratt: As I said before, the testimony is to the effect that it was put in the mail. In spite of that fact Mr. Moncharsh says he didn't get it; perhaps the mail miscarried. This testimony is to show that he acknowledged [4040] receiving it.

The Court: Read the question.

(The question was read by the reporter.)

The Court: Overruled.

Mr. Faulkner: Exception.

The Court: All right. Go ahead.

The Witness: A. Yes, I received a call from him either the day of the 4th or the 5th. I am not sure, but it was right after he received the note, he called me and asked me—— :

Mr. Faulkner: Your Honor, it is not responsive.

The Witness: (Continuing): ——what I mean by writing him notes like that.

Mr. Pratt: Q. I was about to ask you what was said in the conversation. What did he say to you?

A. Well, he said, "What do you mean by writing me notes like that"? I said, "You wanted a report and I reported exactly the way I found it and added just exactly the way I felt about the whole deal."

Q. At a later date, namely, the 13th of November, 1943, where were you, Mr. Gartenberg?

A. At Murietta Hot Springs.

(Testimony of Frank Gartenberg.)

Mr. Faulkner: Same objection, not proper rebuttal and a collateral matter, incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Mr. Faulkner: Exception.

Mr. Pratt: Q. You were where? [4041]

A. At Murietta Hot Springs.

Q. While you were at Murietta Hot Springs did you have any communication with Mr. Moncharsh?

A. I had a telephone call from Mr. Moncharsh that morning.

Q. Did he call you on the phone or did you call him? A. Yes——

Mr. Faulkner: Same objection.

The Witness: (Continuing): ——he called me on the phone.

Mr. Faulkner: Mr. Moncharsh testified about these things and it is not a matter of proper rebuttal.

The Court: Objection overruled.

Mr. Faulkner: Exception.

Mr. Pratt: Q. I direct your attention to an exhibit of the defendant, Exhibit DI, which is a carbon copy of a letter addressed to you. Will you examine that and at the same time would you look at Government's Exhibit 178. Do you recognize that Exhibit 178? A. Yes, sir, I do.

Q. Is that the original apparently of the defendants' exhibit? A. That's right.

Q. Did you receive this letter, Exhibit 178?

A. Pardon me. Yes.

Q. Dated November 13?

(Testimony of Frank Gartenberg.)

Mr. Faulkner: We object to that as not proper rebuttal; incompetent, irrelevant and immaterial.

The Court: Overruled. [4042]

Mr. Faulkner: Exception.

The Witness: Yes, I received it.

Mr. Pratt: Q. This is dated November 13, 1943, from Mr. Moncharsh, and says, "I am enclosing herewith your check covering your pay for this week. Confirming our telephone conversation of today, please be advised effective as of this date your services will no longer be required."

Now, in the conversation, the telephone conversation at Murietta Hot Springs, that was before you received this letter, was it not?

A. That's right.

Q. When did you receive the letter?

A. The letter I received, I believe, on the 15th; it was mailed on the 13th. I must have received it on Monday, the following Monday.

Q. It was addressed to you on Saturday?

A. Yes. I must have received the letter on——

Q. The conversation you had with Mr. Moncharsh over the telephone, what was that?

Mr. Faulkner: We will object to that as incompetent, irrelevant and immaterial, and not impeachment.

The Court: Objection overruled.

Mr. Faulkner: Not within the issues of the case and not proper rebuttal and a collateral matter.

The Court: Overruled.

Mr. Faulkner: Exception.

(Testimony of Frank Gartenberg.)

The Witness: A. First he started asking me how come that [4043] I left the office on Friday morning. I told him I was not feeling very good and besides that I was fed up with the way we were doing business and I was very tired of the whole thing and mail me my check and call it quits.

Mr. Pratt: That is all.

Mr. Faulkner: That is all.

Mr. Pratt: That is all, Mr. Gartenberg.

PEARL H. HAND,

called in rebuttal on behalf of the Government:

The Clerk: You have already been sworn as a witness in this case?

The Witness: Yes.

The Clerk: Will you state your name?

A. Pearl H. Hand.

Direct Examination

Mr. Pratt: Q. Colonel, do you recall a conversation in 1942, the latter part of 1942, at the Townsend Street plant of the Nye & Nissen Company, that you had some conversation or controversy with Mr. Moncharsh? A. Yes, I do.

Q. Will you relate that?

Mr. Faulkner: When was this?

Mr. Pratt: Q. When was that?

A. As I recall it, it was around the first part of November, 1942. [4044]

(Testimony of Pearl H. Hand.)

Q. What was your rank at that time?

A. I was a captain.

Q. What was your position?

A. I was inspector in charge of all meat and meat food and dairy products inspections in San Francisco Bay area.

Q. That included eggs, did it not?

A. Yes, sir.

Q. Will you tell what occurred on this occasion at the plant of Nye & Nissen on Townsend Street?

A. I went down to the plant of Nye & Nissen to make an inspection on purchase orders——

Mr. Faulkner: There must be something wrong. They were not in Townsend Street in November. It must have been with the Rath Packing Company.

Mr. Pratt: Q. Are you able to state exactly when this occurred?

A. No, I am not. It was in 1942, either the late summer or early fall.

Q. Of 1942 at the Townsend Street plant of Nye & Nissen?

A. Yes, it was in the Townsend Street plant.

Q. Did you hear the testimony of Mr. Moncharsh in regard to that episode?

A. Yes sir, I did.

Q. Will you state what occurred as far as you and Mr. Moncharsh are concerned?

A. Well, I do remember——

Mr. Faulkner: I object to that as not proper rebuttal.

The Court: Overruled.

(Testimony of Pearl H. Hand.)

Mr. Faulkner: Exception.

The Witness: A. There was a purchase order for Grade A [1015] eggs, approximately one hundred cases, to go to Fort Stott or Harbor Defenses. I went into the plant to make the inspection in the usual routine manner. I drew samples and took them back to the candling room and candled them, a lot of samples that I had drawn from a hundred cases. I found the eggs did not meet the contract requirement.

Q. How did you determine that?

Mr. Faulkner: We object,

The Witness: I candled this lot of eggs——

Mr. Faulkner: We object to the answer regarding what the contract required. The Army has all these contracts.

Mr. Pratt: Eliminate the question of what the contract called for: What did you do in connection with the examination of eggs on that occasion?

A. I had a lot of eggs to inspect on a Government contract or I wouldn't have been there. So I went into the plant of Nye & Nissen on Townsend Street and drew samples from this lot of eggs. I think this was the third day I had looked at this particular lot of eggs. On this particular morning that this conversation occurred with Mr. Moncharsh I had drawn samples from the lot of eggs and took them back to the candling room and candled them. I found in the lot of eggs washed eggs, cold storage eggs and inedible eggs in the lot. I did not like

(Testimony of Pearl H. Haid.)

them the third day any better than I did the first day that I looked at them. [4046]

Q. What conversation did you have with Mr. Moncharsh on the subject?

A. I reported to one of the supervisors on the floor of the plant that I had rejected the lot of eggs, it didn't meet the contract requirements, it was rejected.

Mr. Faulkner: He was asked for his conversation with Mr. Moncharsh.

Mr. Pratt: That's right. I want to know what was said between you and Mr. Moncharsh?

A. Well, during the usual routine Mr. Moncharsh was called back to the candling room. He was the final trouble shooter, as I understood it.

Mr. Faulkner: I ask all that go out.

The Court: State the conversation you had with the defendant.

The Witness: Mr. Moncharsh came back and said, "What's wrong with the eggs?" I said, "Well, they are washed, they are sandblasted and storage eggs and you have inedibles in the lot. As far as I am concerned they are rejected?"

Mr. Pratt: Q. Did you have some eggs in your hands?

A. He said, "Well, show me any eggs that are washed and soiled and sandblasted or artificially cleaned." I said, "Okeh." I got four or five that had definite stains on them. I could see they had been very dirty eggs that at one time had been artificially cleaned. I took them out to the sunlight.

(Testimony of Pearl H. Pund.)

In the strong light in the candling room it [1047] was not apparent they had been artificially cleaned. So I started to leave the plant. I had about fifteen other plants to make inspections of eggs and I didn't have all morning to spend in the plant of Nye & Nissen.

Q. What was said?

Mr. Faulkner: If the Court, please, in fairness, this witness should not be permitted—not with an intelligent witness—it is all right with Pineda or Andrade—he should not be permitted to just ramble on and vent his spleen against this firm. He is asked a question, he is an intelligent man, he has the intelligence to understand the question.

Mr. Pratt: Yes.

Mr. Faulkner: I object to the details of the witness.

The Court: Proceed.

Mr. Pratt: Q. What was said?

The Witness: A. I walked toward the entrance with Mr. Moncharsh tagging along at my heels. He said, "I would like to have you leave here, leave my plant and never return." He said, "You are not a fair egg inspector. We can't get along." I said, "I would be very happy to leave your plant; as far as I am concerned, I would be very happy if the War Department would extend me the privilege of not coming back here to make inspections any more."

Q. Was anything said about your commanding officer by Mr. Moncharsh?

(Testimony of Pearl H. Hand.)

A. He asked me if I would report it to [4048] my commanding officer. I said I would be very happy to do so.

Q. To whom did you report it?

A. Colonel Foster.

Mr. Pratt: That is all.

Cross Examination

Mr. Faulkner: Q. Colonel, you remember that incident very well, don't you?

A. Very, very well.

Q. Tell me the incident when Jack Smith, who was here yesterday, walked down to the door right about that time and took his coat off and his glasses off, tell me about that?

A. He was trying to get me to take the eggs.

Q. But he took his coat off and his glasses off, didn't he?

A. Yes, he threatened to whip me, but being an officer and a gentleman I could not whip him.

Q. You did not whip him because you could not?

A. I was more abused in that plant than I have any time in my whole lifetime.

Q. The next day—you just said your commanding officer was Colonel Foster. The next day you came into that plant?

A. No. It was that afternoon, it was not the next day; it was that afternoon.

Q. That afternoon you came into the plant at a later period and you went up to Mr. Smith and

(Testimony of Pearl H. Hand.)

said: "I want Mr. Moncharsh to repeat to me what he said yesterday in the presence of this soldier."

A. The War Department ordered me to go back there, so I went. [4049]

Q. You went back?

A. Under orders I went back and that's all.

Q. Yes. Mr. Smith said, "Who is your commanding officer?" A. No.

Q. You said, "General DeWitt."

A. He was my commanding officer.

Q. When he said who was the commanding officer who sent you back you said General DeWitt?

A. That is correct.

Q. General DeWitt was not the man who told you to go back?

A. He was commanding general of the Fourth Army and the Fourth——

Q. He told you to go back to Nye & Nissen with a witness, didn't he?

A. No, I didn't say that.

Q. Well, you had a soldier, a reporter, to take down any statement? A. No.

Q. Now, Colonel, where is the contract to purchase eggs that you say were Extras?

A. I don't know where it is.

Q. You know you were grading Standard eggs day in and day out in that plant, don't you?

A. No, sir. There was a stage the Market Center was not buying Extras. I mean Standards.

Q. Don't you know the Extra eggs bought by

(Testimony of Pearl H. Hand.)

the Army were inspected and shipped to an entirely different branch——

A. They were shipped to the Army.

Q. Your department had nothing to do with their inspection, [4050] did it?

A. Those were purchased for the Army, we were asked to do that.

Q. Colonel Kitchener had the full charge of inspections, the entire service here for the Army, he was buying——

A. Not in the San Francisco Bay area.

Q. Didn't you take eggs out, as you said on your direct examination, on this same incident and hold them to the sunlight?

A. Sure, I did. That is the only way you could see they were not in accordance with the contract requirements, that they had been washed.

Mr. Faulkner: That is all.

The Court: Step down.

Mr. Pratt: Call Colonel Foster.

Mr. Faulkner: Now that the Colonel has testified, your Honor, this is no expert testimony, and I will ask the Colonel retire because the order under which he was permitted to remain was as an expert witness.

Mr. Pratt: No, no.

Mr. Faulkner: Yes, indeed. That is the record in this case.

The Court: He may remain.

Mr. Faulkner: Exception. The Court ruled that way at the beginning of the trial, that the Colonel

could only remain here to aid the Government as an expert.

The Court: The Court has ruled. Proceed.

Mr. Faulkner: Exception.

ROBERT J. FOSTER

called in rebuttal on behalf of the Government; sworn.

The Clerk: Will you state your name?

A. Robert J. Foster.

Direct Examination

Mr. Pratt: Q. Will you state your full name?

A. Robert J. Foster.

Q. Colonel Foster, you are a retired Army officer, are you not?

A. Colonel, retired, regular army.

Q. In 1942, during the latter part of the year, where were you stationed?

A. I was stationed at the Presidio, San Francisco, Forward Echelon, Ninth Service Command.

Q. Do you recall an incident in connection with Colonel Hand insofar as eggs were concerned at the plant of Nye & Nissen about that time, in the latter part of 1942? A. I do.

Q. Did he make some report to you in that connection? A. He did.

Q. I will ask you whether or not you had a conversation with Mr. Moncharsh following that?

A. I had a telephone conversation with him.

(Testimony of Robert J. Foster.)

Q. Did he call you or did you call him?

A. I called him.

Q. What was said?

A. Captain Hand reported—I will [4052] have——

Q. Just what did you say to Mr. Moncharsh?

A. I called Mr. Moncharsh to ask him if he had ordered Captain Hand, or words to that effect, out of the plant and not to make any more inspections of Government deliveries, and he said he had. Then I told him—because Captain Hand was strict and his inspections were unsatisfactory and they could not do business with him, or words to that effect.

Q. This was what Mr. Moncharsh told you?

A. Yes, or words to that effect. I then told Mr. Moncharsh that Captain Hand was the officer in charge of inspections in the Bay area and he represented—and that Captain Hand or his delegated assistants would have to inspect any eggs or products at their plant that was purchased on Government order or there wouldn't be any more deliveries. Mr. Moncharsh didn't agree with that, but I said that was just what I meant, and after some conversation which was always necessary Mr. Moncharsh then said that he guessed he would agree, that Captain Hand would have access to the plant at any time in order to make inspections and accept the products for the Government, because if he did not no products would be accepted for delivery. That is the summary of it.

(Testimony of Robert J. Foster.)

Mr. Platt: That is all.

Cross Examination

Mr. Faulkner: Q. Colonel, you are a retired Army colonel? A. Yes. [4053]

Q. You live in San Francisco?

A. At present I live in Phoenix.

Q. In Phoenix? A. Yes, temporarily.

Q. Well, you lived in San Francisco part of this year? A. Yes.

Q. January and February?

A. That's right.

Q. You were living here then? A. Yes.

Q. Was this your first request to come into court and testify in connection with this incident?

A. Yes.

Q. Your testimony was in respect to an incident and the incident was called to your attention?

A. Yes.

Q. As I understand it, Colonel, you indicated in this conversation, you asked Mr. Moncharsh whether he had ordered or requested Captain Hand not to come back? A. Yes.

Q. And he told you he had?

A. That is right.

Q. And you explained to him that he was an officer who had charge of inspections for the department of which you were the head and that there would be no deliveries if he was not permitted to come back?

A. He or his delegated assistants.

(Testimony of Robert J. Foster.)

Q. He or his delegated assistants? A. Yes.

Q. What did Mr. Moncharsh say to that?

A. Well, he argued, as he always does, and after some conversations, five, ten, fifteen or twenty minutes, he agreed that he would change [4054] his mind and Captain Hand could come in and make the inspections.

Q. What did he say?

A. Well, I don't recall the verbatim words.

Q. At that time you had nothing whatever to do with whether a delivery was made or not, did you?

A. I did. Deliveries could not be made unless the Veterinary Department inspectors accepted them.

Q. The contract requires the one in charge of Veterinary officers—you were only in charge of one division?

A. I was in charge of all Veterinary inspections in the Army in the Ninth Service Command.

Q. You were? A. Yes.

Q. Were you the superior of Colonel Kitchener?

A. Yes.

Q. You were? A. Yes.

Q. What department was he the supervisor of?

A. He was in the Port.

Q. Under the terms of the contract, rather, a contract was let out to the firm of Nye & Nissen or any other company, that would be in the form of a purchase order, wouldn't it?

A. Correct.

(Testimony of Robert J. Foster.)

Q. Your department has nothing to do with a purchase order, has it? A. It has.

Q. Do you issue them? A. We do not.

Q. In other words, your department does not enter into a contract with the vendor of eggs?

A. In the contract [4055] it states that acceptance of the products will be made by the Veterinary Service and I was the Veterinary Service for the Ninth Service Command.

Q. Who? You were just a Colonel in the Veterinary——

A. I represented the Commanding General as chief of the Veterinary Service in the Ninth Service Command and had supervision of all inspections for the Ninth Service Commanding Officer.

Q. At the time of this incident if there was an outstanding contract between the United States Government on the one hand and the firm of Nye & Nissen on the other and they tendered eggs to you under that contract and it was a good delivery the Army had to take them, isn't that right?

A. If it was a good delivery and passed the Army inspection, then we took them.

Q. And the final inspection would be at the point of delivery?

A. It is two ways, point of delivery—it is inspected at the plant and at point of delivery.

Q. The acceptance of the transaction by the Army is at the point of delivery?

A. Correct.

Q. When the Army man goes into a man's plant

(Testimony of Robert J. Foster.)

he goes in there at the courtesy of the vendor, doesn't he? A. He does not.

Q. Where is that provided in the contract, that the man can go into any vendor's plant at any time he wishes? [4056]

A. He can go in because there are two ways to save the contractor trouble, inspections would be made and were made all the time at the plant and then reinspected at point of delivery.

Mr. Faulkner: That is all.

Mr. Pratt: That is all.

E. HEWITT MAGEE

called in rebuttal on behalf of the Government;

The Clerk: You have already been sworn as a witness in this case? A. I have.

Q. State your name? A. E. Hewitt Magee.

Direct Examination

Mr. Pratt: Q. Mr. Magee, on or about the first day of September, 1944, did you have a conference with Mr. Moncharsh? A. Yes.

Q. Where?

Mr. Faulkner: There was an order excluding witnesses in this case, your Honor. I see one sitting here, Colonel Foster is sitting here.

Mr. Pratt: They have finished their testimony.

Mr. Faulkner: I know, but the case is not finished.

(Testimony of E. Hewitt Magee.)

Mr. Pratt: Well, I don't object to them being excluded.

Mr. Faulkner: I do.

Mr. Pratt: I don't object to their being excluded. [4057]

Mr. Faulkner: Oh!

The Court: They may retire.

Mr. Pratt: Q. Where was this conference, Mr. Magee?

A. The conference was in the office of Mr. Moncharsh at 17th and Missouri Streets.

Q. Who accompanied you?

A. Special Agent Dallas Johnson.

Q. Was this an extended conference?

A. As far as I recall, it lasted for an hour and a half or two hours, or longer.

Q. I will ask you whether on that occasion Mr. Moncharsh said to you in substance and effect that he personally knows all of the types and qualities of all eggs sold and delivered out of Nye & Nissen's plant in San Francisco. A. Yes, he did.

Q. On that same occasion I will ask you whether he said to you that he knew and was familiar with the grading of all eggs sold to the Government from that plant? A. He did.

Q. And, further, I will ask you whether on that occasion he said that he personally dictated all the policies of Nye & Nissen and regulated and decided the daily prices on their products?

A. Yes, he did.

Q. I will ask you further whether on that occa-

(Testimony of E. Hewitt Magee.)

sion he said to you that he knew the quality of eggs on the floor of Nye & Nissen at San Francisco at all times? A. He did. [4058]

Mr. Pratt: That is all.

Cross Examination

Mr. Faulkner: Q. Mr. Magee, you were out at the plant of Nye & Nissen and you talked to Mr. Moncharsh, is that correct?

A. Yes, I did.

Q. It is your practice to make an original note of the conversations that you have with witnesses, is it not, in longhand?

A. On most occasions.

Q. On that occasion did you make a note?

A. Yes, I did.

Q. Have you got the original handwritten notes of the conversation that you had with Mr. Moncharsh? A. Yes, I do.

Q. Where is it? A. Right here.

Q. May I see it?

A. This top page was made after returning to the office.

Q. Where are the notes you made during the course of your conversation with Mr. Moncharsh?

A. The later page, I think.

Q. In other words, while you talked to him you were writing at that time, is that correct?

A. Yes, I did write down some of the conversation.

Q. What?

(Testimony of E. Hewitt Magee.)

A. I made notes of part of the conversation. That is the note you have.

Q. You mean the white——

A. These and this page were, I believe, the ones.

Q. You testified the white ones were made there? [4059]

A. I am quite sure that last yellow sheet was also made there.

Q. You asked the questions, you or Mr. Johnson?

A. We both did. I believe I asked some of the questions; we were both together and both talking there.

Q. Are there any references in these notes to the subject of Mr. Moncharsh knowing every case of eggs on the floor at his plant?

A. I believe there are some references in there.

Q. Show me. A. Not exactly those words.

Q. Show me where you wrote down at that time Mr. Moncharsh stated that he knew every case of eggs on the floor of his plant at all times?

A. Well, I wrote——

Q. Just show me the place, that is all I asked.

A. I don't have it in those exact words. I can show you three or four places where I referred to the fact that he was familiar with the cases of eggs.

Q. Just show where you wrote that. What was the page you read from, Mr. Pratt?

Mr. Pratt: 3850.

Mr. Faulkner: 3850.

(Testimony of E. Hewitt Magee.)

Mr. Pratt: I think you are mistaken, Mr. Faulkner, in the wording.

Mr. Faulkner: That might be. That is why I want to get the page.

Mr. Pratt: You might take my copy. I have it underscored. [4060]

Mr. Faulkner: This was in the month of September, is that right?

A. This was on September 1, 1944.

Q. Where is the part in this note where Mr. Moncharsh stated that "I am personally familiar with the type and quality of all eggs sold and delivered out of Nye & Nissen's plant in San Francisco?" Show me that.

A. Well, here is a note right here to that effect.

Q. Just show it to me? A. Right here.

Q. You pointed to this place, "When questioned as to why he argues with inspectors regarding quality, he said"—something or other.

A. Well, he elaborated on that at the time.

Q. In other words, you memorized it, that he stated that he knew the type and quality of all the eggs on the floor of his premises and when he stated that to you, you wrote down in your notes so a couple of years later you could give an accurate description of what was said; you wrote down a question as to why he argued with inspectors regarding quality and he said he knows of—

A. He knows what the eggs are, he told us that he knew what all the eggs were in the plant.

Q. He knew what?

(Testimony of E. Hewitt Magee.)

A. He knew the quality of all the eggs, that's why he argued when the inspectors made gradings that he did not agree with. He told us that he first stated that. [3061]

Q. Mr. Magee, now will you please look through there and show me where he stated, where you made a note that Mr. Monchareh stated that he was familiar with the quality of——

A. Well, I read it.

Q. I would like you to point it out?

A. Well, I did point it out. It starts right here.

Q. Is that one of the notes where he stated that?

A. Sure.

Q. Have you any other?

The Court: Just a moment. What did he state?

The Witness: I recall what he stated. I made a brief note at the time.

The Court: Read it.

The Witness: A. "When questioned as to why he argues with the inspectors regarding the quality of the eggs he said he knows what they are."

Now, that I recall distinctly was at the time he said he knew what the quality of the eggs were before the inspectors ever looked at them and for that reason he would argue with them if he did not think they were grading them correctly.

I also have, I think, another reference in here to that.

Mr. Faulkner: Q. Just point it out to me, please. A. Well, right here.

Q. What you pointed out is not a statement that

(Testimony of E. Hewitt Magee.)

he knew the quality of all the eggs in the plant of Nye & Nissen, is it? [4062]

A. Nobody knows——

Q. I just asked you if you had written in your notes any resume or words similar to the words you just testified as being used on your conversation with Mr. Moncharsh.

A. I think this is similar to it.

Q. That relates to storage eggs, doesn't it?

A. Not necessarily. He said he knows——

Q. Just a minute.

The Court: Just a moment, just a moment. Let him read the notes. Let him proceed.

Mr. Faulkner: I did not ask him to read the note. He is volunteering. I except to a ruling that permits the witness to read a note when it is not responsive to a question.

The Court: The Jury is entitled to it. Read the notes.

The Witness: A. I have a particular note here when we were talking to Mr. Moncharsh about whether he sold washed or storage eggs to the War Shipping Administration or to the Army, he said he wouldn't have any storage eggs in October, 1942, and he also said, "He knows that none were used because he knows that all the eggs came out of the plant in San Francisco," which at the time he made the statement that he knew the quality of all the eggs sold by that plant, that is why I put this note down here and for that reason I know they never sold any washed or storage eggs.

(Testimony of E. Hewitt Magee.)

Mr. Faulkner: Q. Where is the question?

A. I don't — [1063] I am not a shorthand expert, I don't take down every word that was asked. I made notes so I will have them before me to dictate my report.

Q. As you sit there now you remember questions your asked him and you remember answers he gave?

A. I remember that interview quite clearly.

Q. When you were down on the waterfront inspecting these ships you could not remember about some of the ships unless you had your notes?

A. Well, that was a little different. I interviewed Mr. Moncharsh once and I can remember that interview quite clearly with or without the notes.

Mr. Faulkner: We ask the notes be marked for identification.

The Court: Admitted and marked.

(The notes were thereupon marked Defendant's ET for Identification.)

Mr. Faulkner: That is all, Mr. Magee.

DALLAS A. JOHNSON

called in rebuttal on behalf of the Government;

The Clerk: You have already been sworn and testified in this case?

The Clerk: Q. Will you state your name?

A. Dallas A. Johnson.

Direct Examination

Mr. Pratt: Q. Mr. Johnson, you heard Mr. Magee's testimony? A. Yes, sir.

Q. Do you recall the interview that was had with Mr. Moncharsh on that occasion, on September 1, 1944? A. Yes, sir.

Q. Did you take any notes?

A. No, I did not take any notes at that time.

Q. Do you recall what was said?

A. Yes, I do, in general.

Q. Do you have access to Mr. Magee's notes?

A. Yes, I have read them.

Q. You were working with him? A. Yes.

Q. On that occasion? A. That is correct.

Q. I will ask you whether on that occasion Mr. Moncharsh said that he personally was familiar with the type and quality of all eggs sold and delivered out of the Nye & Nissen plant in San Francisco? A. Yes.

Q. And whether he said that he knew and was familiar with the grades of all eggs sold to the Government from that plant? A. Yes.

Q. And whether he said that he personally de-

(Testimony of Dallas A. Johnson.)

cided all the policies of Nye & Nissen and regulated and decided the daily prices of their products?

A. Yes.

Q. And whether he said that he knew the quality of eggs on the floor of Nye & Nissen's plant in San Francisco? A. Yes.

Mr. Pratt: That is all. [4965]

Cross Examination

Mr. Faulkner: Q. Mr. Johnson, at the time you were out there with Mr. Magee you did not take notes? A. No.

Q. You have refreshed your recollection by those notes taken by Mr. Magee?

A. Yes, I have. Well, I had a general recollection and I refreshed my memory further from his notes.

Q. What was the question that you asked Mr. Moncharsh to which he replied that he regulated all the prices for merchandise that was being sold and he decided the daily prices for the merchandise that was being sold?

A. We were questioning Mr. Moncharsh in regard to——

Q. I just want to get the question.

A. Well, without giving the background the question wouldn't be——

Q. Just a moment.

A. (continuing)——discernible. I don't know the exact question. However, I think—I will give in substance what the question was. We questioned

(Testimony of Dallas A. Johnson.)

Mr. Moncharsh concerning the prices as charged on the invoices which had been submitted to the War Shipping Administration during the months of April and May, 1944, and asked him whether, or how it was that he determined the prices and he said, "We determine the price on the basis of what the market will bear" and he stated, or explained that further by saying that if people needed merchandise they were willing to pay any money for it and would be satisfied, and we asked him if he followed [4066] the OPA. I think that he said, "Yes, I follow the OPA ceilings" and we asked him who it was in the plant who had the authority to set the prices and he said that he was the person to set the prices.

Q. Mr. Johnson, is this what he told you, that ordinarily they fixed the price of merchandise according to the existing market; that's right, isn't it; he said that?

A. I don't know whether he used those exact words or not. However, that was part of the conversation, yes.

Q. At the time you were out there talking to Mr. Moncharsh in September, or was it September or November?

A. It was September.

Q. September.

A. I also saw him during November, but I don't think I had any conversation with him at that time.

Q. In the September meeting isn't this correct,

(Testimony of Dallas A. Johnson.)

there had passed through your hands certain transactions with the War Shipping Administration?

A. That is true.

Q. At the time you were talking with Mr. Moncharsh you knew just as certain as you sit there on that chair that sales were governed—sales to the War Shipping Administration were governed by food regulations and by OPA ceilings, didn't you, you knew that?

A. In general I knew that all prices in the United States were governed by the OPA.

Q. You knew at the time you were having this conversation with Mr. Moncharsh that he had no more to do with the fixing [4067] of the prices for his butter and eggs and cheese than Mr. Gagan, the shorthand reporter, sitting there, didn't you?

A. Well, I did know he had more to do with it than that, because at that particular time, during April and May, 1944, generally the sales of butter, eggs and cheese were below the ceiling prices around this area because of the fact there was a lot of merchandise available; therefore, I noticed that many sales made not at the then prevailing prices around the Bay area, but at the exact ceiling, so we questioned him as to how they determined the price.

Q. You mean that his price was the ceiling price; your observation was that his price was the ceiling price?

A. That is with various interpretations it was

the ceiling; with other interpretations it was over the ceiling.

Q. Well, if you read the regulations it was under the ceiling, wasn't it?

A. No.

Q. A half-cent under?

A. No; it was two cents over. The OPA regulations governing the price of Medium Processed AA eggs.

Q. Medium Processed AA eggs?

A. April and May, 1944, it was 39 cents.

Q. Plus a cent for processing, plus two cents for certification?

A. No, that is not true. The ceiling at that time during April and May, 1944, was 38 cents plus one cent for processing, which made it 39. His company was not [4068] entitled to sell eggs as certified, therefore they could not charge the 41.

Q. Did you discuss that with Mr. Moncharsh then?

A. No. We discussed that with him——

Q. Mr. Johnson——

A. I am answering your question.

Q. You did not discuss prices in detail at that time, is that right?

A. Well, I don't know what you mean by "detail." We discussed prices with him, but I don't remember whether or not I asked him about 39 cents or 41 cents, and I don't remember whether we discussed the exact pennies.

Q. At all events, he said the price was determined by the market, didn't he?

(Testimony of Dallas W. Johnson.)

A. In general.

Q. Yes, in general.

A. But on specific instances it was determined by deliveries as made.

Q. Did you participate in the conversation where he said something about being familiar with the type and quality of all eggs sold and delivered at the plant? A. Out of the plant?

Q. Out of the plant?

A. Yes, I was present at that time.

Q. What question did you ask him?

A. I think that that conversation came up as a result of the discussion of the episode concerning the William Clark, and we were asking him. I think we pointed out to him that an examination of the eggs on the William Clark had disclosed they were storage eggs and [4069] we asked him if they had sold those eggs to the War Shipping Administration. He said no. We said, well, what is it that makes you so positive that you have not sold any cold storage eggs to the War Shipping Administration; and before that he had said, he didn't know what went out of the plant, and then he said, we pointed out to him there were cold storage eggs on the Clark and I said, "You just said you didn't know what went out of the plant," and he said, "I know what eggs go out of the plant. I know what they are when they leave here."

Q. In that conversation in respect to who had charge of these things that were the subject matter of this discussion— A. What?

(Testimony of Dallas A. Johnson.)

Q. In connection with the matter of who had charge of these sales was the explanation made by Mr. Moncharsh of the position Mr. Smith had with the War Shipping Administration, didn't he explain that by saying that he handled this account?

A. I think at one part of the conversation he said that Mr. Smith handled certain of the companies of the War Shipping Administration, if I remember correctly, I might be incorrect in this, but I believe the discussion came out that Mr. Berman also handled quite a number of the War Shipping vessels.

Q. And Mr. Moncharsh told you that?

A. That is as I recall.

Mr. Faulkner: That is all.

Mr. Pratt: The Government rests, your Honor. [4070]

Mr. Faulkner: You say you rest?

Mr. Pratt: Yes.

Mr. Faulkner: Will your Honor indulge us a moment?

The Court: Just a moment.

Mr. Faulkner: Your Honor will recall at the conclusion of the Government's case there were some extended motions to strike made by the defendants and they were dictated into the record in full. Your Honor is, of course, familiar with them. We will renew, your Honor, those motion to strike.

The Court: Pardon me. Does this conclude the testimony?

Mr. Faulkner: Yes, your Honor.

The Court: Both sides?

The Court: Very well, proceed.

Mr. Faulkner: Yes, your Honor.

Mr. Pratt: Yes, your Honor.

Mr. Faulkner: We will renew that same motion to strike, or made a motion to strike as though each phase of the motion as originally made to your Honor was repeated again at length. Does that sufficiently identify the motion, your Honor, for the Court's purposes?

The Court: Do you submit it?

Mr. Faulkner: I wish to supplement that by additional motion. Is that agreeable to you? [4071]

Mr. Pratt: Yes.

Mr. Faulkner: We wish to supplement the motion in respect to testimony that involved the question of what are or what are not collateral matters and in that respect we move to strike out the Hammond Shipping Company letter and the testimony of the impeaching witness, Gartenberg upon the ground that those are all collateral matters and that when they were inquired into by the Government they were bound by the answers of the witnesses and they cannot produce evidence of a type which has no relevancy to the substance of the charge as a basis of impeachment, and we include that in the motion to strike, your Honor.

The Court: Motions and each of them will be denied.

Mr. Faulkner: We make an additional motion on behalf of each of the defendants in respect to the four girls who testified here on the ground the

testimony of none of them was impeachment and that an analysis of their testimony with the testimony of Mr. Menges shows no conflict and it was offered here as the basis of impeachment by a blanket question that called for the opinion and conclusion of the witnesses and when the answer was given it was disclosed that they never received the instructions testified to on direct examination, that was brought out on cross-examination, and there was no impeachment. That is the testimony of Mrs. Valdez, Mrs. McKenna, Mrs. Matheson and Mrs. Higuera. [4072]

The Court: Motion denied.

Mr. Faulkner: At the conclusion of the Government's case a motion was made in respect to a directed verdict and it must be renewed at the close of all the evidence. Those motions were likewise read into the record in detail on behalf of each defendant separately and individually and now at the conclusion of the taking of all testimony in this case we renew it in a form as though it were repeated, each word of those motions at this time at length.

The Court: Motions and each of them will be denied for the purpose of the record.

Mr. Faulkner: Exception. Exception to all the ruling the Court made.

The Court: Note an exception.

Mr. Pratt: If the Court please, at the conclusion of the Government's case the Government moves to make all evidence documentary and oral relating to the delivery of eggs on the ships other than those

mention of in the substantive counts 2 to 7, applicable to all of the substantive counts and that will be all the transactions excepting only the evidence relating to the Hawaiian Shippers, which occurred in November, 1944. In other words, it will make it applicable to the conspiracy count and also make all the evidence on the six substantive counts applicable to each and all of the said counts and also to the conspiracy count, and the Government [4073] now renews that motion.

The Court: Submitted?

Mr. Faulkner: We oppose it again.

The Court: The Court is prepared to grant it now.

Mr. Faulkner: In the form, I think, your Honor, that it is—the motion made, your Honor, would clearly be erroneous.

The Court: It is time to take a recess. The Jury may retire.

(The Jury retired and Counsel argued the motions. The Jury was thereupon returned into court.)

The Court: Waive the roll call, stipulating and agreeing all the jurors are present.

Mr. Faulkner: Your Honor, I want to clear up a mistake I made in phraseology. Under the new rules the motion for a directed verdict should be either that or a motion for acquittal, as it is now described. That is the motion I make.

The Court: Yes. Motions will be denied.

Mr. Faulkner: Exception.

The Court: Ladies and gentlemen, we are now

about to take a recess until two o'clock this afternoon. Keep in mind the admonition of the Court and return at two o'clock. [4074]

(A recess was thereupon taken until two o'clock p. m.)

(The matter was thereupon argued to the Jury by respective counsel at 2:00 o'clock p. m., after which an adjournment was taken until tomorrow morning, Friday, April 5, 1946, at 10:00 o'clock a. m.) [4074-a].

Saturday, April 6, 1946, 9:30 o'clock a. m.

The Clerk: United States v. Nye & Nissen.

The Court: Call the roll of the jurors.

(The roll was called and all jurors were present.)

CHARGE TO THE JURY

The Court (orally): Ladies and gentlemen of the jury, it now becomes the duty of the court to instruct the jury on the law of this case, and it becomes the duty of the jury to apply the law thus given to them to the facts before them. The jury are the sole judges of the facts.

It is the duty of the jury to give uniform consideration to all of the instructions herein given, to consider the whole and every part thereof together, and to accept such instructions as a correct statement of the law involved.

While it is the duty of the court to declare the law and that of the jury to be governed by it in their consideration of the evidence, it is, on the

other hand, the exclusive province and right of the jury to pass upon the facts of the case and the credibility of the witnesses. With these functions the court has nothing to do other than to endeavor to see that only proper evidence is permitted to go before the jury for their consideration and it is neither the province nor the disposition of the court intentionally to interfere with that duty of the jury. If, therefore, during the [4075] progress of this trial you have gathered any impression from anything which the court may have asked of a witness or stated in its rulings as to the views or judgment of the court on the question of the guilt or the innocence of any defendant, or as to the weight of any evidence or the credibility of any witness, you will disregard any such impression and base your finding upon your own independent judgment as what the evidence discloses.

The indictment on file herein is, and is to be considered as a mere charge or accusation against the defendants, and is not of itself any evidence of the defendants' guilt, and no juror in this case should permit himself to be, to any extent, influenced against the defendants, or any of them, because or on account of such indictment on file.

The defendants have each entered a plea of not guilty to the indictment filed herein; that is, each defendant denies the material allegations of such indictment.

Therefore, as to any charge made in said indictment filed herein, the burden under the law is upon the prosecution to prove to a moral certainty and

beyond a reasonable doubt, all the material allegations of such charge.

In the course of these instructions the words "defendants" and "defendant" will be frequently used and unless some particular defendant is named, it will be understood that each defendant is thus specifically referred to. [4076]

In this indictment a company, Nye and Nissen, Inc., has been made a defendant. In this connection you are instructed that, being a corporation, it is criminally responsible for the acts of its officers or agents performed within the scope of their authority and for and on behalf of the company. Conversely, it is not responsible for the acts of its officers or agents committed for their personal benefit or performed outside the scope of their authority.

Now by "scope of authority" I do not mean that the corporation, by resolution of its board of directors or otherwise, must have expressly authorized the officer or agent to perform specific unlawful acts. What is required is that the corporation shall have delegated to such officer or agent the authority to represent the corporation with respect to the general subject-matter involved.

For example, if a corporation delegates to an officer or general agent the authority to manage the company or one of its departments or plants, and in performing the tasks incidental and necessary to such management the officer or agent acts in an unlawful manner but for the benefit of the corporation, then the corporation is criminally responsible

for such unlawful acts because they have been performed within the scope of the general management powers delegated to such officer or agent.

Count 1 of this indictment charges the offense of conspiracy. [1077] It is drawn under a statute, the pertinent portions of which provide:

"If two or more persons conspire . . . to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be (punished in the manner provided.)"

In this count it is charged that, beginning about January 1, 1938, and continuing to June 20, 1945, the defendants wilfully and knowingly conspired to defraud the United States:

"A. By grading, weighing, packing, selling, and delivering to the United States of America—War Shipping Administration, War Department, and Navy Department, inferior products through frauds and deceptions practiced upon the inspectors, graders, and representatives of the United States Department of Agriculture, the War Shipping Administration, United States War Department, and United States Navy Department, who inspect, weigh, grade, and receive butter, cheese, and eggs sold and delivered to said United States of America—War Shipping Administration, War Department, and Navy Department.

"B. By impeding, impairing, obstructing, and defeating the lawful functions of the United States Department of Agriculture, War Department, and

Navy Department [4078] in the inspection, grading, weighing and purchase of butter, cheese and eggs.

"6. By circumventing and avoiding the standards, grades, weights, and specifications to which said purchases are subject by means of false and fictitious inspection, grading, and weighing; by the prevention of honest and accurate inspection, grading, and weighing by said representatives; and by other tricks, schemes, devices, and concealments in the manner and by the means hereinafter set forth."

The count then proceeds to describe the plan of the conspiracy in some detail, and concludes by charging that certain overt acts were committed in pursuance of the conspiracy and to effect its objects.

In order to establish the crime charged in count one the Government must prove to a moral certainty and beyond a reasonable doubt, first, that a conspiracy in the manner in this count alleged was in fact entered into by mutual agreement or understanding of the defendants during the time alleged, and second, that in order to effect the unlawful object of the conspiracy one or more of the defendants committed one or more of the overt acts charged in this count.

To constitute a conspiracy it is not necessary that two or more persons should enter into an express or formal agreement for the doing of the unlawful acts charged; or that they [4079] should directly, by words or in writing, state between themselves what the unlawful plan or scheme is to be, or the

details thereof, or the means by which the unlawful combination is to be made effective. It is sufficient if two or more persons, in any manner or through any contrivance, positively or tacitly, come to a mutual understanding to accomplish a common and unlawful design. In other words, when an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together in any way in furtherance of the unlawful scheme, every one of such persons becomes a member of the conspiracy.

Under the charge made the conspiracy constitutes the offense and it must be made to appear from the evidence, beyond a reasonable doubt, before any defendant can be convicted, that such defendant was a party to the conspiracy, and unlawful agreement charged, and that he continued to be such up to the time that overt acts were committed, if the evidence shows that there were any such acts. The mere fact that a defendant named may have engaged in the performance of any of the acts charged in the indictment as overt acts, would not authorize a conviction by reason of that fact alone, but it is necessary to show that such defendant (or defendants) were parties to the conspiracy and unlawful agreement before the defendant's guilt is made out. [1080]

Each party must be actuated by an intent to promote the common design. If persons pursue by their acts the same unlawful object, one performing one act, and a second another act, all with a view to the attaining of the object they are pursu-

ing, the conclusion is warranted that they are engaged in a conspiracy to effect that object. Cooperation in some form must be shown. There must be intentional participation in the transaction with a view and purpose to further the common design. And if a person, understanding the unlawful character of a transaction, encourages, advises, or in any manner, with a purpose to forward the enterprise or scheme, assists in the prosecution, he becomes a conspirator. And so a new party coming into a conspiracy after its inception, with knowledge of its purpose, and with intent to promote the same, becomes a party to all the acts done before his entrance into the conspiracy, as well as to the acts done afterwards. Joint assent and joint participation in the conspiracy may be found, like any other fact, as an inference from the facts proved.

Where the existence of a criminal conspiracy has been shown, every act or declaration of each member of such conspiracy, done or made pursuant to the plan and in furtherance of the object, is considered the act and declaration of all the conspirators, and is evidence against each of them. On the other hand, after a conspiracy has come to an end, [4081] either by the accomplishment of its object, or by the parties abandoning it, evidence of acts or declarations thereafter made by any of the conspirators can be considered only as against the person making the acts or declarations. The declaration or act of a conspirator not in execution of the common design is not evidence against any of

the parties other than the one making such declaration.

The evidence in proof of a conspiracy may be circumstantial. Where circumstantial evidence is relied upon to establish the conspiracy or any other essential fact, it is not only necessary that all the circumstances concur to show the existence of the conspiracy or fact sought to be proved, but such circumstances must be inconsistent with any other rational conclusion, and inconsistent with the defendant's innocence. That is, you are to consider all of the circumstances and conditions shown in evidence, and if it appears to you as reasonable men and women that, even though there is no direct evidence of the actual participation in the alleged offense by the defendant (or defendants), a reasonable inference from all the facts and circumstances does to your mind, beyond a reasonable doubt, show that the defendants, or some of them, were parties to the conspiracy as charged, then you should make the deduction and find accordingly.

For one person to abet another person in the commission of a criminal offense, simply means, to knowingly and with [4082] criminal intent aid, promote, encourage or instigate, by act or counsel, or by both act and counsel, the commission of such criminal offense.

In this connection you are instructed that once a conspiracy has been established, the acts and declarations of any conspirator, made in furtherance and during the continuance of the conspiracy, are admissible against all of the other conspirators

even if made in their absence or without their knowledge.

During the course of the trial I have instructed you to consider certain of the testimony relating to acts and declarations of a defendant only against the defendant actually participating therein.

At this time you are instructed that, if you are satisfied beyond a reasonable doubt (1) of the existence of the conspiracy charged, (2) of the participation therein by the defendants, and (3) that such acts were done and declarations were made in furtherance of the conspiracy, you may then consider the testimony relating to such acts and declarations against all of the defendants, even those who were not present when such acts and declarations occurred.

By the term "overt act," as used in these instructions, is meant any act committed by one of the conspirators to effect the object and accomplish the purpose of the conspiracy. The act need not be criminal in nature, if considered separately and apart from the conspiracy. It may be as innocent as the act of a man walking across the street, or driving an automobile, or using a telephone. It must, however, accomplish or follow the agreement and be done in furtherance of its object.

If you find that the conspiracy has been established, and that during its existence an overt act was done by one of the conspirators, the offense charged is then complete, and it is complete as to every party found by you to be a member of the conspiracy at the time the overt act was committed.

no matter which one of the conspirators did the overt act.

The remaining counts of the indictment, Counts II through VII, charge substantive offenses. They are drawn under a statute, the pertinent portions of which provide as follows:

"* * * whoever shall knowingly and willfully * * * make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States * * * shall be (punished in the manner provided)."

In each of these counts it is charged, in substance, that at a specified time and place the defendants knowingly and willfully made or used or caused to be made or used a [4084] certain false invoice covering a sale and delivery of eggs, butter, or cheese by Nye and Nissen to the United States of America—War Shipping Administration.

Each of these counts further charges that the invoice in question contained statements and entries which were fraudulent and fictitious in that the eggs, butter, or cheese delivered were of a lower grade, weight, or price than that represented and billed for in the invoice, and that each of the defendants well knew such to be the fact when he made or used the invoice or caused it to be made or used.

With respect to each of these substantive counts, you are instructed that the invoice in question is included within the general terms "bill," "voucher,"

"account," "claim," and "certificate" as they are used in the statute.

I instruct you in connection with counts two to seven, inclusive, that the mere fact that one is an officer or employee of a corporation does not render him criminally responsible for the acts of other officers, agents or employees of the corporation, unless the evidence establishes beyond a reasonable doubt not only that he knew of such acts but that he actually participated or aided in the performance of the same with the specific intent to defraud and deceive in the manner alleged in the indictment.

The defendants are here charged only with those things which are set out in Counts I to VII, inclusive, of the [4085] indictment. They are not to be tried upon any other issue.

In order to sustain a conviction of any defendant on any of the substantive counts, the Government must prove beyond a reasonable doubt each and every material allegation of such counts.

The Government must prove beyond a reasonable doubt:

First, that the invoices described in the substantive counts are in fact fraudulent and fictitious.

Second, that the defendants knew such invoices were at the time fraudulent and fictitious.

Third, that the invoices pertained to matters within the jurisdiction of a department or agency of Government.

Fourth, that the defendants intentionally used or caused to be made and used false and fictitious

invoices in the manner set forth in the indictment, and

Fifth, that the defendants, in using the invoices at that time, did so with criminal intent, that is to say with the intent to defraud and deceive.

Failure to prove any one of these five essential elements beyond a reasonable doubt as to any or all of the defendants will entitle such or all of the defendants to an acquittal at your hands.

You are further instructed that as a matter of law (1) the War Shipping Administration is an agency of the United States, and (2) the making and using of each of the invoices [4086] pleaded in these counts was a matter within the jurisdiction of the War Shipping Administration within the meaning of the statute.

In each of these substantive counts, however, it remains for you to determine: (1) whether the invoice in question contains statements and entries which were fraudulent and fictitious in the manner described in the indictment; (2) whether the defendants made or used such invoice or caused it to be made or used; and (3) if they did, whether in so doing they acted knowingly and willfully, that is, with intent to deceive and defraud and not through mistake or inadvertence.

If, with respect to the invoices involved in all or any of the substantive counts, you find beyond a reasonable doubt that such invoice contained material misrepresentations as to the grade, weight, or price of the eggs, butter, or cheese delivered, and that the defendants or any of them willfully made or used such invoice, or caused it to be made or

used, knowing of these material misrepresentations, then you will find such defendant or defendants guilty of the offenses charged in such substantive counts of the indictment.

If you believe from the evidence that the invoices used or caused to be made and used by the defendants were false or incorrect merely because of some inadvertence, mistake or negligence on the part of one or more of the defendants [4087] or some other person, then you shall find the defendants not guilty of the substantive offenses.

In determining whether each of the defendants made or used these invoices, or caused them to be made or used, it is not required that you find that each defendant saw or handled the invoices or were present when they were made. One who aids, abets, counsels, commands, induces, or procures the commission of an act is as responsible for that act as if he committed it directly. Consequently, if you find that one or more of the defendants aided, induced, or otherwise procured the making or using of these invoices, then you must find that they caused them to be made or used within the meaning of the statute.

The defendants are presumed to be innocent, and this presumption has the weight and effect of evidence in their behalf, and continues to operate in their favor until it is overcome by competent evidence. If the evidence introduced does not overcome this presumption of innocence to your satisfaction to a moral certainty and beyond a reasonable doubt, you must find the defendants not guilty.

It is not necessary for the defendants to prove

their innocence; the burden rests upon the prosecution to establish every element of the crime with which they are charged to a moral certainty and beyond a reasonable doubt.

You are instructed that in every crime or public offense [4088] there must exist a union or joint operation of an act and the intent to commit the crime or crimes charged and unless you are convinced beyond a reasonable doubt that a defendant did some act with intent to commit the crimes charged in the indictment, you must acquit such defendant.

However, a person must be presumed to intend to do that which he voluntarily and willfully does in fact do, and must also be presumed to intend all the natural, probable and usual consequences of his own acts.

I charge you that there are certain types of crimes which are complete when the person intentionally does the acts denounced by law. There is another class of crime which requires not only the deliberate act but a further element, to wit, the commission of the act with a specific intent. The first intent, that is, general intent, is merely to do the act; the second class is to do the act with a specific intent that this act may bring about a certain result.

The specific intent involved in each count of this indictment is an intent to defraud the United States. This intent is a question of fact which must be proven by the prosecution beyond a reasonable doubt. After considering all the evidence, including the presumption of honest and lawful intent

with which every defendant is clothed, should you entertain a reasonable doubt as to the intent of any defendant to defraud the United States you must acquit such defendant or defendants for whom you entertain such doubt. [1089]

The determination of a charge in a criminal case involves the proof of two distinct propositions: First, that the crime charged was committed; and, second, that it was committed by the person accused thereof and on trial therefor.

These two propositions, and every essential and material fact necessary to them, or to either of them, must be established by the Government to a moral certainty and beyond a reasonable doubt.

A reasonable doubt is a doubt resting upon the judgment and reason of him who conscientiously entertains it from the evidence in the case. It is a doubt based upon reason. By such a doubt is not meant merely every possible or fanciful conjecture that may be suggested or imagined. A reasonable doubt is that state of the case which, after the entire comparison and consideration of the evidence in the cause, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

A reasonable doubt is not a mere imaginary or possible doubt, but a fair doubt based on reason and common sense, and growing out of the testimony in the case.

The jury are the sole and exclusive judges of the effect and value of evidence addressed to them and

of the credibility of the witnesses who have testified, [illegible] and the [illegible] of the facts as shown by the evidence, should [illegible] taken into consideration for the purpose of determining their credibility and the facts as to whether they have spoken the truth. And the jury may scrutinize not only the manner of each witness while on the stand, their relation to the case, if any, but also their degree of intelligence. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies; his interest in the case, if any; (or a motive for testifying falsely, if any;) or his bias or prejudice, if any, against one or more of the parties; by the character of his testimony; or by evidence affecting his character for truth, honesty or integrity, or by contradictory evidence.

In determining the credibility of a witness, you should consider whether the testimony of any witness is, in itself, contradictory; whether it has been contradicted by other credible witnesses; whether the statements made by any witness are reasonable or unreasonable; whether they are consistent with other statements, or with the facts established by other evidence, or admitted facts.

You may also consider the witness' manner of testifying on examination; the character of the testimony; the bias or prejudice, if any, manifested; the interest or absence of interest in the case; their degree of intelligence; their recollection, whether good or bad, clear or indistinct, concerning the facts testified to; the inclination or motives [4091]

together with the opportunity of the witness knowing the facts whereof he may speak.

If you believe from the evidence herein that any witness was influenced or induced to become such and to testify in this case, by any promise of immunity from prosecution or punishment, or any hope held out that he would not be prosecuted for any offense or offenses committed by him, then the jury should take such facts into consideration in determining the weight and credit which ought to be given to testimony thus obtained.

A witness may be impeached by the party against whom he was called by contradictory evidence, by evidence that he has made at other times, statements inconsistent with his present testimony. If you find that any witness has been impeached, or that the presumption of truthfulness attached to the testimony of such witness has been repelled, then you will give the testimony of such witness such credibility, if any, as you may consider it entitled to. Where a showing of inconsistent statements by way of impeachment is allowed and made, you, as jurors, nevertheless remain the exclusive judges of the credibility of all the witnesses, and are just as much entitled to believe the witness whose statements are impeached as the witness who impeached.

A witness false in one part of his or her testimony is to be distrusted in others; that is to say, the jury may reject [4092] the whole of the testimony of a witness who has wilfully sworn falsely as to a material point; and the jury being convinced that a witness has stated what was untrue, not as the

result of mistake or inadvertence, but wilfully and with the design to deceive, must treat all of his or her testimony with distrust and suspicion, and reject all unless they shall be convinced, notwithstanding the base character of the witness, that he or she has in other particulars sworn to the truth.

Certain officers and employees of the Federal Government have appeared as witnesses in this case. The fact that they are connected with the Federal Government should give them no special weight or credibility. You should weigh the testimony from each such witness from what he said and what impression you got from him on the stand. And, in that connection, you should take into consideration and apply to him the rules which are laid down as to all other witnesses.

You have been confronted with what the law calls "expert testimony." The difference between ordinary and expert testimony is as follows:

Ordinarily, a witness is allowed to testify only as to facts which he has seen or observed. An exception to this rule occurs in the case of a so-called "expert witness," who is allowed to give his opinion in any matter pertaining to a science, art or trade in which he is skilled. The amount of [4093] skill, training or study devoted by the particular expert to the field in which he gives his opinion, goes to the weight of his evidence and must be determined by you.

If the jury should find that a particular expert witness possesses the necessary background, training and experience in the subject matter involved

in his discussion, then they shall consider his opinion as a matter of evidence which shall be treated in the same light as any fact testified to in the case.

You are instructed that while the defendant, in a criminal action is not required to take the stand and testify, yet, if he does so, his credibility, and the value and effect of his evidence are to be weighed and determined by the same rules as the credibility and effect and value of the evidence of any other witness is determined. If a defendant elects to take the stand and testify in his own behalf, his testimony is to be weighed in the same manner and measured according to the same standard as the testimony of any other witness, (and the tests for determining credibility of witnesses as given you in another part of the instructions are to be applied to his testimony alike with that of all other witnesses.) No greater or lesser presumption attaches in favor of his testimony than attaches to that of any other witness, with this additional feature, however, that you should weigh the defendant's testimony in the light of the fact that he is the defendant [4094] in the case, and that he has an interest in the outcome of the case, because of that fact.

The court instructs you that accomplices are competent witnesses. The Government has a right to use them as such. It is the duty of the court to admit their testimony, and your duty to consider it. The testimony of an accomplice, however, is to be received with caution. The jury should not rely upon it unsupported, unless it produces in their minds the conviction of its truth. If it does, of

course, you should act upon it, if it is proper in such case, for you to seek corroborating facts and circumstances, but which is not absolutely essential, providing the testimony of such witness produces in your minds a conviction of its truth.

An accomplice is anyone who knowingly, aid, voluntarily cooperates with, aids, assists, or advises or encourages another in the commission of a crime regardless of his degree of guilt. It is for you to determine as a question of fact in this case whether or not a particular witness is an accomplice as I have defined it. If you find that certain witnesses who have testified in this case, aided or abetted in the commission of any of the crimes charged in the indictment, or otherwise acted as an accomplice in their commission, then I instruct you that the testimony of such witnesses or witness should be viewed with caution.

There are two classes of evidence recognized and admitted [1095] in courts of justice, upon either of which juries may lawfully find an accused guilty of crime. One is direct or positive testimony of an eye witness to the commission of the crime, and the other is proof by testimony of a chain of circumstances pointing sufficiently strong to the commission of the crime by the defendant, and which is known as circumstantial evidence. Such evidence may consist of admissions by the defendant, plans laid for the commission of the crime, such as putting himself in position to commit—in short, any acts, declarations, or circumstances admitted in evidence

tending to connect the defendant with the commission of the crime.

Circumstantial evidence includes any fact which may tend to prove the issues presented, and may consist of any act, circumstance or declaration admitted in evidence and tending to connect the defendant with the commission of the crime charged. In order to convict, the circumstances must be such as to produce the same degree of certainty as direct evidence. There is nothing in the nature of circumstantial evidence which renders it any less reliable than any other class of evidence; if it produces in the minds of the jury a conclusion of the defendant's guilt beyond a reasonable doubt, it is sufficient.

If, upon consideration of the whole cause, you are satisfied to a moral certainty and beyond a reasonable doubt of the guilt of the defendants, or either of them, you should [4096] so find, irrespective of whether such certainty has been produced by direct evidence or by circumstantial evidence. The law makes no distinction between circumstantial and direct evidence in the degree of proof required for conviction, but only requires that the jury shall be satisfied beyond a reasonable doubt by evidence of either the one character or the other, or both.

In cases of circumstantial evidence, facts should be proven which are not only consistent with the guilt of the defendant, but inconsistent with any other reasonable hypothesis of innocence.

If the evidence relating to any circumstances in

this case is, in view of all the evidence, reasonably susceptible of two interpretations, one of which would point to the defendant's guilt, and the other of which would admit of his innocence, then it is your duty in considering such evidence to adopt that interpretation which will admit of the defendant's innocence, if the same may be done reasonably.

The jurors are not permitted to speculate as to what evidence might have been, or could not have been, produced by either side. The jurors are only to consider the evidence consisting of the testimony of the witnesses and the documents introduced, which have been admitted by the court in evidence, and such inference and deductions as they may reasonably draw must be founded on the evidence which was introduced, and that alone, and not upon speculation as to evidence [4097] which might have been but was not introduced.

Testimony has been introduced by the prosecution which it is claimed tends to show the commission of other acts or offenses by the defendant similar to that charged in the indictment. I charge you that this evidence was admitted for the sole purpose of proving guilty intent, motive, or guilty knowledge of the defendant, and that it can be considered by you for no other purpose.

I instruct you that you are to determine the guilt or innocence of the defendants solely from the evidence that has been adduced here on the witness-stand and admitted in evidence by the court. If you have read any account containing an alleged statement of the facts involved in this case, you are to

dismiss that from your mind and disregard it. You are not to base your verdict upon the expressions or expressions contained in any newspaper.

It is your duty under your oaths as jurors to consider and deliberate upon the evidence without fear and without favor, and it is your duty to find your verdict solely upon the evidence uninfluenced by any interest any individual or individuals or any person in any private or public capacity could take in the conviction or acquittal of the defendants.

I charge you that if, after consideration of the whole case, any juror should entertain a reasonable doubt of the guilt of any defendant it is the duty of such juror so entertaining such doubt not to vote for a verdict of guilty, nor be influenced when so voting, for the single reason that a majority of the jury should be in favor of the verdict of guilty.

The court cautions you to distinguish carefully between the facts testified to by the witnesses and the statements made by the attorneys in their arguments, or presentations as to what facts have been or are to be proved. And if there is a variance between the two, you must, in arriving at your verdict—to the extent that there is such variance—consider only the facts testified to by the witnesses; and you are to remember that statements of counsel in their arguments or presentations are not evidence in the case.

If counsel, upon either side, have made any statements in your presence concerning the facts of the case, you must be careful not to regard such state-

ments as evidence, and must look entirely to the proof in ascertaining what the facts are.

If counsel, however, have stipulated or agreed to certain facts, you are to regard the facts as stipulated to, as being conclusively proven.

In determining the issues of facts herein, the matter of the penalty prescribed by law for the punishment of the offense involved, should form no part of your deliberations and should you be aware of any such penalty, it is your duty to disregard such knowledge, in other words, it is your sole [4099] duty to decide whether the defendant is guilty or not guilty of what he is charged with in the indictment herein. The question of punishment is left wholly to the court, except as the law circumscribes its power.

If you should find that there are discrepancies or inconsistencies existing in the testimony of any witness, or between the testimony of any witnesses, or if you should find yourselves disagreeing over various issues, real or apparent, you should then ascertain whether or not such discrepancies or inconsistencies, or such points of difference, affect the true issues in this case. Examine such discrepancies or inconsistencies and such disputed points, look at the same squarely and ask yourselves these questions: How does the decision of this, or that, or the other discrepancy or matter in dispute affect the guilt or innocence of the defendant? Regardless of what may be the truth concerning such discrepancies or inconsistencies ask yourselves the main question, did or did not the defendant com-

mit the acts as alleged in the indictment? Is such discrepancy or such disputed point material to establish the main and material issue of fact as to the guilt or innocence of the defendant. If they are not material, if the decision of the same is not necessary to enable you to arrive at the truth of the guilt or innocence of the defendant, then such discrepancies or disputed points are immaterial and minor matters, and do not [4100] waste further time in discussing or considering them. Spend no time in the discussion of minor matters which, whether true or false, do not affect and are not necessary to enable you to answer the important question: Did the defendant do those things set forth in the allegations of the indictment?

The court is permitting the jury to take with it to the jury room the indictment in this case. The court does so, however, with the caution and admonition that the indictment is not to be considered by the jury as any evidence against the defendants. The indictment is simply the formal charge made by the Government and must be considered by the jury in that light and in no other light. In other words, the indictment is being given you for the purpose of informing you more at length as to the precise charges made.

There are five different defendants on trial here. It goes without saying, of course, that though all of the five defendants are charged jointly, yet the guilt or innocence of each must be determined by the jury separately.

The indictment contains seven counts, each of

which is a charge against the five defendants on trial. Each count must be considered by you as a separate and several charge against each of the defendants, and according to such view as you may take of the evidence, it is permissible for you to find [copy illegible] than one defendant guilty of any particular count, [copy illegible] defendants or defendant not guilty. [4101]

Likewise, from your view of the evidence, it is permisible for you to return a verdict of guilty on one or more counts, and not guilty on the remainder.

In determining what your verdict shall be, you are to consider only the evidence before you. Any testimony as to which an objection was sustained, and any testimony which was ordered stricken out, must be wholly left out of account and disregarded.

The verdict of the jury should represent the opinion of each individual juror; it by no means follows that the opinions may not be changed in the jury room. The very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves.

There is nothing peculiarly different in the way a jury is to consider the proof in a criminal case from that by which jurors give their attention to any question depending upon evidence presented to them. You are expected to use your good sense, consider the evidence for the purpose only for which it has been admitted, and in the light of your knowledge of the natural tendencies and propensities of human beings, resolve the facts according to deliberate and cautious judgment; and while remember